

INTERIOR BOARD OF LAND APPEALS

Forest Service, U.S. Department of Agriculture  
(Heirs of Surge Bay Joe)

141 IBLA 211 (November 13, 1997)

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FOREST SERVICE  
U.S. DEPARTMENT OF AGRICULTURE  
(HEIRS OF SURGE BAY JOE)

IBLA 95-283

Decided November 13, 1997

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application A-01584.

Affirmed.

1. Alaska: Native Allotments

Actual occupancy and continuous use of a tract of land by an Alaskan Native prior to its inclusion within a national forest confers a preference right to an allotment under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). The applicant's preference right is not adversely affected because use and occupancy occurred prior to passage of the 1906 Act, or because the application was filed subsequent to the proclamation creating the forest withdrawal.

APPEARANCES: James J. Ustasiewski, Esq., Office of General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the Forest Service; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

The Forest Service (FS), U.S. Department of Agriculture, has appealed from a January 26, 1995, Decision of the Alaska State Office, Bureau of Land Management (BLM), approving Native allotment application A-01584. On April 7, 1913, the Bureau of Indian Affairs filed, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), 1/ an

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1/ The Act of May 17, 1906, as amended by the Act of Aug. 2, 1956, 48 U.S.C. § 357 (1958), was repealed by § 18(a) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1617(a) (1994), effective Dec. 18, 1971, subject to applications pending on that date. The Act of May 17,

application for a Native allotment and proof of use and occupancy on behalf of Surge Bay Joe (a.k.a. Joe Osborne). The application stated that Surge Bay Joe had occupied "for many years" approximately 40 acres of unsurveyed land later described as secs. 4 and 5, T. 45 S., R. 55 E., Copper River Meridian, Alaska.

The lands embraced by the application were included in the "Alexander Archipelago Forest Reserve" created by Proclamation No. 37 on August 20, 1902. See 32 Stat. 2025 (1902). Acting under section 24 of the Act of March 3, 1891, ch. 561, 26 Stat. 1103, President Roosevelt "reserved [the affected land, subject to valid existing rights,] from settlement, entry or sale." 32 Stat. 2025. The Reserve was subsequently incorporated into the Tongass National Forest pursuant to an Executive order dated July 2, 1908, which preserved the reservation.

The file contains a land office field investigation report dated November 12, 1926. According to that report, a June 7, 1926, field investigation disclosed a partially demolished frame house on the land. Surge Bay Joe indicated in an interview "that he had lived in the house on the land at intervals for a number of years, \* \* \* and made his living entirely by fishing." The inspector found that the tract was "adverse to farming," and that there was no evidence of cultivation or farming. He concluded that Surge Bay Joe had not complied with the 1906 Act and recommended that the application be rejected.

On November 1, 1927, the Department rejected the application. Surge Bay Joe died on December 29, 1933.

On April 13, 1989, a BLM realty examiner conducted another field examination. He found that there was a cabin, fire pit, and well marked trail on the land. He concluded that the parcel showed evidence of longterm, heavy use which could not have been casual or intermittent. Based on statements by witnesses, the examiner found that this use was by Surge Bay Joe and occurred prior to the forest withdrawal.

The FS also inspected the parcel and prepared a field report, a copy of which it transmitted to BLM. That report, dated September 1, 1994, states that the applicant's occupancy, claimed since 1850, was corroborated by the affidavits of several individuals and predated the forest withdrawal.

In accordance with Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), BLM reinstated the application on June 30, 1981, because the Department

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fn. 1 (continued)

1906, authorized the Secretary of the Interior to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land upon satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. §§ 270-1 and 270-2 (1970).

had rejected it without an opportunity for hearing on the question of fact whether Surge Bay Joe had complied with the requirements of the Native Allotment Act. <sup>2/</sup>

The BLM's Decision states that Surge Bay Joe was born around 1840, possibly as early as 1823, and that based on affidavits "it is assumed that his use and occupancy began around 1850." (Decision n.1.) The file contains the affidavits of Mary J. Johnson, Edith Bean, Richard Sheakley, Sr., and Ralph Austin, Sr., applicant's great-great-grandson. Johnson and Beane knew the applicant, attesting that he had used the land since 1850. Johnson, Beane, and Sheakley all stated that they were familiar with the applicant's land. The BLM found that Surge Bay Joe had claimed the property since 1850 and had used it openly, notoriously, and independently. (Decision at 4.) The BLM concluded that the lands were vacant, unappropriated, and unreserved at the time occupancy was initiated and that the applicant had satisfied the requirements of the 1906 Act. It therefore approved Native allotment application A-01584.

The FS does not dispute the evidence of use and occupancy relied on by BLM for approving the allotment. Rather, FS contends that a Native allotment applicant in Surge Bay Joe's circumstances was precluded from establishing a right to ownership of the land, or any other right vis-a-vis the United States, before passage of the Native Allotment Act. (Statement of Reasons (SOR) at 6.) It observes that under the 1956 amendment to the 1906 Act, 43 U.S.C. §§ 270-1, 270-2 (1970), a Native could establish a preference right to land within a national forest only if he made substantially continuous use and occupancy of the land prior to the establishment of the forest. Citing *Shields v. United States*, 504 F. Supp. 1216 (D. Alaska 1981), *aff'd*, 698 F.2d 987 (9th Cir. 1983), *cert. denied*, 464 U.S. 816 (1983), FS argues that the 1956 amendment to the 1906 Act was intended to protect national forests, and not to recognize a right to an allotment in national forests that had been reserved prior to passage of the 1906 Act. (SOR at 7.) The FS argues that the land was withdrawn before Surge Bay Joe "could establish a preference right, or any other rights, under the Native Allotment Act." (SOR at 4.) Citing the Alaska Organic Act of May 17, 1884, section 8, 23 Stat. 24, 26, FS contends that an Alaska Native could

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<sup>2/</sup> The BLM is required by § 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1994), to reinstate, for purposes of either legislative approval or adjudication, any Native allotment application that was rejected by the Department without an opportunity for a hearing on a disputed question of fact, as required in 1976 by the Federal appeals court in *Pence v. Kleppe*, 529 F.2d 135, 142-43 (9th Cir. 1976). See S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5182; *Ellen Frank*, 124 IBLA 349, 351-52 (1992). This is so even if an applicant was notified of an earlier rejection and no appeal was taken, since lack of compliance with *Pence* vitiates the administrative finality that would otherwise attend the rejection. *Heirs of George Titus*, 124 IBLA 1, 4 (1992).

establish no rights, prior to the passage of the Native Allotment Act on May 17, 1906, to land withdrawn as part of the Tongass National Forest on August 20, 1902.

The BLM answers that under the 1956 amendments to the 1906 Act, specific provision is made for allotments within national forest lands, where occupancy of such lands occurs before establishment of the forest, citing section 2 of the Act of August 2, 1956. The BLM further notes that the 1906 Act established a preference right for applicants who had used the land prior to the passage of the Act. The BLM contends that the fact that the forest was reserved prior to passage of the 1906 Act is not determinative of the status of Surge Bay Joe's allotment application. (Answer at 4.) The BLM notes that the retroactive effect of the preference right under the 1906 Act was set forth in a Departmental instructional circular and restated in subsequently issued circulars at 35 Interior Dec. 437 (1907), and 37 Interior Dec. 615 (1909). (Answer at 7.)

[1] Inclusion of the land within the national forest does not preclude Surge Bay Joe's heirs from obtaining his allotment if his use and occupancy preceded establishment of the forest. Forest Service, U.S. Department of Agriculture (Heirs of Frank Kitka), 133 IBLA 219, 222 (1995); see 43 U.S.C. § 270-2 (1970); Yakutat & Southern Railway v. Harry, 48 Interior Dec. 362, 364 (1921). The Native Allotment Act of May 17, 1906, as amended by section 2 of the Act of August 2, 1956, 43 U.S.C. § 270-2 (1970), provided:

Allotments in national forests may be made under section 270-1 to 270-3 of this title if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

The Arguments made by FS in this case were considered and rejected in Kitka, supra, at 222-23. We observed in that case that the court in Shields v. United States, supra, ruled that Alaskan Natives applying for allotments within a national forest were required to establish personal, rather than ancestral, use and occupancy prior to establishment of the national forest. These cases held that Congress intended "to restrict allotments within national forests by prohibiting them except to those individuals who could demonstrate personal occupancy of the land prior to the establishment of the forest." 504 F. Supp. at 1219-20.

We also noted in Kitka, supra, at 223, that, rather than operating to preclude the establishment of Native rights, the Alaska Organic Act, 23 Stat. 24, 26, and the Act of June 6, 1900, 31 Stat. 321, 330, recognized and protected Native possessory rights. See Sandra M. Pestrikoff, 23 IBLA 197, 202 (1976).

As noted earlier, the evidence of Surge Bay Joe's use and occupancy is not in dispute. We conclude that BLM properly reinstated and approved Native allotment application A-01584.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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James P. Terry  
Administrative Judge

I concur.

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Will A. Irwin  
Administrative Judge